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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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REPLY BRIEF FOR THE PETITIONERS.

ARGUMENT.

I.

REGULATION OF THE TIME AND PLACE OF PEACEFUL PICKETING IS CONSTITUTIONAL.

Evidently Mosley thinks that an ordinance which requires the police to make an appraisal whether picketing is being carried on with an intent to disrupt school classes or obstruct school entrances would be constitutionally preferable to a narrowly drawn enactment, such as the legislation

here under scrutiny, which simply prohibits picketing within a short distance of schools during school hours. Mosley's preference would invite overbroad enforcement. Certainly it is desirable to eliminate or at least limit, insofar as possible, the subjective discretion of police officers.

This Court knows far better than the instant litigants whether or not its precedents corroborate Mosley's view (Respondent's Brief, p. 1) that "[p]eaceful picketing is protected free speech and *only* the manner or purpose of picketing may be regulated when required by an overriding state interest;" (emphasis supplied).

To us it seems clear enough that these precedents unmistakeably hold that the time and place of peaceful picketing may be regulated, if this furthers a substantial governmental interest—provided the governmental interest is unrelated to the suppression of free expression. *United States* v. *O'Brien*, 391 U. S. 367, at 376 (1968), bears this out. We cited *O'Brien* in our Petitioners' Brief (pp. 24, 25), but Respondent's Brief failed to respond.

Mosley also has nothing to say in reply to our citation (Petitioners' Brief, pp. 22, 33) of this Court's clear statement on this topic in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963). In holding unconstitutional breach of the peace convictions of a group demonstrating on State House grounds, this Court there said (at 236):

> "If . . . the petitioners . . . had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case."

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), this Court, after citing 12 precedents, stated (at 554, 555):

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that

everyone with opinions or beliefs to express may address a group at any public place and at any time. . . .

"We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

And in the other *Cox* v. *Louisiana*, 379 U. S. 559 (1965), this Court said (at 574):

"There is a proper time and place for even the most peaceful protest. . . ."

Mosley's claim (Respondent's Brief, p. 7) that "peaceful picketing is beyond governmental regulation" is irreconcilable with these and other well-known decisions of this Court.

Grayned's directing the Court (Appellant's Brief, p. 15) to Kalven's article, *The Concept of the Public Forum: Cox* v. *Louisiana*, Supreme Ct. Rev. (1965) 1., for a detailed account of the opinions of this Court on this topic, is somewhat surprising. Kalven regards all speech as necessarily "speech plus" (at 23 et seq.). He advocates the drafting of a set of "Robert's Rules of Order for use of the public forum of the streets" (at 26), regulations precisely drawn in terms of "the neutrality of time, place and circumstance" without concern for content (at 29), with the aim of "some commitment to order and etiquette" in the use of the public forum (at 23). Kalven cites (23-25) "the champion of the position that the First Amendment is an absolute," Meiklejohn, *Political Freedom* (1960), 24-28, in support of a "call for regulation of such activity on behalf of the rational use of speech resources" and quotes (at 25) Meiklejohn, who said, in part:

> "Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, *a classroom,* a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary." (Emphasis supplied.)

Kalven himself half suggests (at 17) that a city might be able to "solve its problems by setting aside special areas for protests and demonstrations and closing its streets and parks to them otherwise," that is, "the setting up of 'Hyde Parks'."

Thus, according to Grayned's prime repository of constitutional wisdom on this topic, regulation of the time and place of peaceful demonstrations and picketing is not unconstitutional. In comparison with Kalven's proposals, Chicago's buffer zone of 150 feet around public schools during school hours is an extremely modest regulation.

II.

THE COURT CAN TAKE JUDICIAL NOTICE OF THE BACKGROUND OF WIDESPREAD DISORDERS AT SCHOOLS THAT OCCASIONED THE ENACTMENT OF THIS ORDINANCE.

"Courts are presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true." *Chicago* v. *Murphy,* 313 Ill. 98, 102 (1924).

Facts enter importantly into the legislative process. The reasonableness of legislation is commonly tested by the courts against a factual background of their own developed by the broadest kind of judicial notice. Cleary, *Handbook of Illinois Evidence* (1963), p. 44.

Mosley's brushing aside (Respondent's Brief, p. 12) our allusion (Petitioners' Brief, pp. 5, 8, 10) to the notorious

school disorders of recent years as "bandy[ing] about phrases" is irresponsible. The purpose of a legislative enactment is to be gathered from the whole act. It is not necessary that the legislature make express findings of fact. "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act." *Miller v. Milwaukee*, 272 U. S. 713, at 715 (1927) (Holmes, *J.*).

Nor is it true that, as Mosley avers (Respondent's Brief, p. 3), our contention that the ordinance "was enacted as a result of widespread violence and disorders around schools [is] totally unsupported by the record." The opinion of the Court of Appeals itself notes that "[d]efendants justify this ordinance as a reasonable attempt to forestall violence in an era* of protest and demonstration by the creation of a 150 foot 'buffer zone' during school hours."

It is singularly inappropriate for Respondent to attempt, in this Court, to force a view of the constitutionality of this ordinance, on its face, prismatically, solely through the refracted image of Mosley's picket sign, and not in the bright light of a national crisis, with which the ordinance attempts to cope, locally. This Court cannot "be regarded merely as another law court" (Jackson, *The Supreme Court in the American System of Government* (1963 ed.), p. 2). It is also a function of this Court to keep the Constitution attuned to the needs of "a society in which rapid changes tend to upset all equilibrium" (*id.*, p. 61). It does not assist the Court in the performance of this function, to insist, as Mosley does, that the Court blind itself to what everyone knows.

Counsel for Respondent themselves necessarily know,

*A. 45 incorrectly renders this as "area of protest and demonstration." That is a typesetter's error. See 432 F. 2d 1256, at 1258. The appendix to our petition for certiorari (p. A4) reproduced the word correctly as "era".

from their participation as attorneys for the defendants in three prosecutions under this ordinance, now pending and under advisement in the Illinois Appellate Court, First District (*City of Chicago* v. *Polito et al.*, Nos. 54334-5-6), that the immediate occasion for the enactment of this ordinance was the need to protect black school children, who had been bussed to predominantly white schools, from hostile mobs. That is of record in the *Polito* cases. (*Polito*, Exc. 75-81.)

This ordinance is a more essential instrument in combatting racial discrimination than Mosley's picket sign.

III.

UNDER BOTH THE "OLD" AND THE "NEW" EQUAL PROTECTION, THE EXEMPTION OF LABOR PICKETING IS NOT INVIDIOUS DISCRIMINATION.

The exemption of labor picketing from the scope of the ordinance is without doubt valid under what is now frequently called the "old" Equal Protection, enunciated in such cases as *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949), *Goesaert* v. *Cleary*, 335 U. S. 464 (1948), *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), and *McGowan* v. *Maryland*, 366 U. S. 420 (1961). The essence of this doctrine was succinctly stated by Chief Justice Warren in *McGowan* (at 425, 426) thus:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some in-

equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch* v. *Board of River Port Pilots Comrs.*, 330 U. S. 552, 91 L. ed. 1093, 67 S. Ct. 910; *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912 C 160; *Atchison, T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609."

Another articulation of the traditional criteria, also by Chief Justice Warren, is to be found in the fairly recent *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802, at 808 (1969):

"Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations.]"

The exemption of labor picketing from the ordinance is amply justified under this test. A state of facts certainly may be reasonably conceived to justify the exemption. The City Council without doubt has some reason to conclude that labor picketing is now usually more orderly than "public issue" picketing. Employees have a very palpable economic stake in their employer's business and their jobs there. Labor picketing is usually directed by experienced

professionals and under the much more detailed guidelines laid down by the National Labor Relations Board, which is empowered to issue unfair practice charges against unions as well as employers. Labor picketing is now usually token picketing. See Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. Rev. 177, at 208, 209 (1966). The distinction between labor picketing and "public issue" picketing is reasonably related to the requirements of assuring orderly conditions for the conduct of public education, certainly a legitimate state end.

Justice Frankfurter, in his well-known summary in *Niemotko* v. *Maryland*, 340 U. S. 268, at 273-283 (1951), of the principal decisions of this Court, to that date, concerning "[a]djustment of the inevitable conflict between free speech and other interests", touched upon the difference between labor picketing and general use of the streets for communication, whether of religious exhortation, political propaganda or protest. He said (at 276):

> "The picketing cases are logically relevant since they usually involve, in part, dissemination of information in public places. But here also enter economic and social interests outside the situations before us."

The distinction between labor picketing and "public issue" picketing was clearly drawn in *Davis* v. *Francois*, 5 Cir., 1968, 395 F. 2d 730, at 735. Speaking of an ordinance of Port Allen, Louisiana, which absolutely limited all picketing to a maximum of two pickets, that court said:

> "By failing to distinguish 'public issue' pickets from private pickets the ordinance creates numerous problems. Private pickets are usually concerned with labor disputes. It would appear that the statute might reach even these, since private residences and places of business are within its ambit. The decisions suggest that private pickets are exercises of economic power and create many issues not caused by the 'public issue' demonstration." See *International Brotherhood, etc.*,

v. *Vogt, Inc.*, 1957, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347; *Hughes* v. *Superior Court*, 1949, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985."

Under the "new" Equal Protection as is well known, the Court has in recent years applied more stringent criteria in cases involving "fundamental" rights. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). It is stated in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, at 670 (1966), thus:

> "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."

What this implies is succinctly put in *Shapiro* v. *Thompson*, 394 U. S. 618, at 638 (1969):

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." (Emphasis in original.)

Karst has articulated the "new" Equal Protection into a three-part formula: (1) Does the classification "discriminate" against "a disadvantaged group"; (2) Does that discrimination relate to an interest that is "basic" or "fundamental" or "critical"; if so, (3) Is the state's justification "compelling" enough to overcome the presumptive invalidity implied in a phrase like "strict scrutiny"? Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 U. C. L. A. L. Rev. 716, at 739 (1969).

Should the "new" Equal Protection be applied to the ordinance at bar? Does the exemption of labor picketing "discriminate" against a "disadvantaged group"? The group that is subject to the limitation is simply the general public; that cannot be considered a disadvantaged group.

Is the interest in engaging in the speech-plus activity of demonstrating and picketing within 150 feet of a school during school hours and within one-half hour before and after school hours "basic", "fundamental" or "critical"? In the heat of advocacy, counsel for Mosley may be expected to argue that it is. But common sense requires a different answer.

In *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802 (1969), this Court, in holding that an absentee balloting statute did not violate the equal protection clause in failing to provide coverage for pretrial jail inmates, ruled that the "new" Equal Protection did not apply, even though voting rights were involved. Although as determined in *Reynolds* v. *Sims*, 377 U. S. 533 (1964) and *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), the franchise is a basic, fundamental right, the Court ruled (at 807) that the more exacting approach was not applicable, because (1) "Illinois' absentee provisions are not drawn on the basis of wealth or race" and (2) because the right to vote was not at stake, but merely a claimed derivative right to receive absentee ballots. In consequence, the Court applied the "old", less stringent criteria, which are stated thus by Chief Justice Warren (at 809):

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations.]"

The classification in the instant ordinance is not based on wealth or race. The right of free speech is not at stake, for "public issue" picketers can still picket at any distance in excess of 150 feet from a school, even during school hours, and they can also picket even on the steps of the school itself outside school hours—even though hundreds

of students are then still to be found in the recreational area. The reasoning of the Court in *McDonald* establishes the validity of the labor exemption in the Chicago Ordinance.

The exemption of labor picketing is also justified by a "compelling" state interest—the interest in promoting freedom of speech. Experience over the years had convinced the City Council of Chicago that it had no reason to fear disruption of the schools by labor picketing. Therefore, although the many disruptions arising from "public issue" demonstrations at schools in recent years made advisable, in the legislative judgment, the creation of a small buffer zone around schools during school hours, there was no reason to apply this so as to limit labor picketing. Chicago has kept the restrictions on demonstrating to the bare necessary minimum.

Mosely's citation (Respondent's Brief, p. 18) of Justice Black's concurring opinion in *Cox* v. *Louisiana*, 379 U. S. 559, at 581 (1965), is inapposite. The Louisiana statute Justice Black was discussing, while generally prohibiting obstruction of public sidewalks, streets, highways, bridges, passages, corridors, etc., expressly exempted any "bona fide legitimate labor organization." In other words, the Louisiana statute permitted labor organizations, but no one else, to obstruct public passages in picketing and other concerted activities. It is difficult to construe that as other than invidious discrimination. The Louisiana statute allowed labor organizations, that is, those "bona fide" unions of which the authorities approved, to picket and demonstrate on every public street and sidewalk, but prohibited picketing and demonstration on any public street or sidewalk by all others (including, of course, civil rights organizations).

The Chicago ordinance does no such thing. It is limited to the narrow area of 150 feet from public schools during

school hours. It makes no distinction between labor picketing and other picketing except in those strictly delimited places and even there, only at such times as schools are in session or students are coming and going. The Louisiana statute was sweepingly broad; the Chicago ordinance is precisely narrow.

Mosley uses a strong word negligently when he states (Respondent's Brief, p. 16) that the "Petitioners concede . . . that the pre-emption argument is spurious." Petitioners actually said (Petitioner's Brief, p. 27) that "[t]he argument based on federal pre-emption has some merit." They further stated that, despite the exemption in Section 152 of the National Labor Relations Act (29 U. S. C. A. § 152) of states and their political subdivisions from the definition of "employer," nevertheless, since observance by employees of private employers of picket lines of public employees can have repercussions in the federal sphere, the City was well advised to avoid this quagmire of labor law and labor relations by exempting labor picketing from the ordinance.

CONCLUSION.

The judgment of the Court of Appeals should be reversed in its entirety.

Respectfully submitted,

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